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No. 85-626

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, § 1, 1915 CL 5477, et al

Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, et al

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHERE THE FEDERAL COURT ABSTAINED FROM DECIDING THIS CAUSE BASED UPON THE DOCTRINE SET FORTH IN RAILROAD COMMISSION v. PULLMAN CO, DID THE COURT ERR IN DISMISSING CLAIMS OF PARTIES WHO WERE NOT PETITIONERS?

II.

IS ABSTENTION UNDER THE PRINCIPLES SET FORTH IN RAILROAD COMMISSION v. PULLMAN CO APPROPRIATE WHERE THE STATE SUPREME COURT HAS REFUSED TO ADDRESS STATE LAW QUESTIONS INVOLVING A DETERMINATION OF DISPUTED FACTS?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Michigan Const 1963, art 11, § 5, provides:

> "The classified state civil service shall consist of all positions in the state service . . .
>
> • • •
>
> "The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation . . . and regulate all conditions of employment in the classified service."

The Michigan Public Act creating the Michigan State Accident Fund, 1912 PA 10 (First Extra Session), Part V, is set forth at pp 52a-57a of Petitioners' Appendix.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners assert that the Accident Fund was statutorily created to be "a private independent entity." The three officers of the State of Michigan named as Respondents are required by law to administer the statute which created the Accident Fund and to administer the provisions of the Michigan Constitution, which require the Civil Service Commission to classify all positions within the state service.

In 1911, the Michigan legislature established a "Commission of Inquiry" to investigate "the matter of compensation for accidental injuries or death of workmen arising out of and in the course of employment." 1911 P.A. 245, § 2. that commission recommended the establishment of an "accident fund"

under the supervision of the Commissioner of Insurance, saying:

> "It has also been asserted at these hearings that these funds can be collected and disbursed more efficiently through the instrumentalities of the State than in any other manner."
>
> *Report of the Employers' Liability and Workmen's Compensation Commission*, pp 26, 27 (1911).

Following the Commission of Inquiry's report, the State's first workers compensation law was adopted. 1912 P.A. 10 (First Extra Session). Part V of the act created the Accident Fund. (52a-57a)

Section 1 of Part V required the Commissioner of Insurance to assume charge of levying and collecting from employers such premiums and dividends as necessary to pay compensation under the act and the cost of administration if five or more employers employing 3,000 employees request the Commissioner to do so.

Section 2 of the act authorized the creation of a fund in the State Treasury to be known as "accident fund" and required the Commissioner of Insurance to provide a bond.

Section 3 of the act authorized the Commissioner of Insurance to readjust the premuims from time to time, as necessary.

Section 4 of the act required the Commissioner of Insurance to classify employers by risk and determine premiums to be charged each employer.

Section 5 of the act provided that suits to collect premiums "shall be collected by an action at law in the name of the state as plaintiff. . . ."

Section 8 of the act provided that employers who refuse to submit their books for inspection by the Commissioner of Insurance shall become subject to a penalty of $50.00 for each offense "to be collected by civil action in the name of the state and paid into the accident fund. Any individual who shall personally give such refusal shall be guilty of a misdemeanor."

Section 10 of the act provided:

> "Disbursements from said accident fund shall be made only upon warrants approved by the board of state auditors upon vouchers therefore transmitted to it by the commissioner of insurance. . . ."

Five years later, 1917 P.A. 206 created an "advisory board", which was given the statutory authority to fix the compensation of the Commissioner's deputies and assistants, which power had previously been held under the 1912 act by the Board of State Auditors. 1917 P.A. 206 also provided, in Section 12 thereof, that the advisory board members are to be nominated at the annual meeting of employers and certified to the Governor. The nominees "shall receive an appointment as such by the Governor to serve for the term of two years." Section 13 of 1917 P.A. 206 provided:

> "The advisory board shall advise with the Commissioner of Insurance as to the means and methods of administering the affairs of the said accident fund, not inconsistent with the provisions of this act."

The State of Michigan is required to provide workers compensation benefits to its employees through the State Accident Fund, M.C.L.A. 550.701 *et. seq.*; M.S.A. 24.571 *et. seq. The employees of the State Accident Fund are in the state employees retirement system,* M.C.L.A. 38.13; M.S.A. 3.981(13).

The State Accident Fund continues as a fund in the state accounting system, M.C.L.A. 21.101a; M.S.A. 3.606(1a).

On December 7, 1976, Attorney General Frank J. Kelley issued O.A.G. 1975-1976, No. 5147, p. 695 (December 7, 1976), stating at p 698 thereof:

> "Having determined that the State Accident Fund is a state agency, it is clear that the legislature may control the authority and operations of the Fund and may, if it chooses to do so, disband the operation of the Fund completely. Also, employees of the Fund are state employees and, as such, are within the classified State Civil Service, Const 1963, art II, § 5, *DeMaggio* v *Attorney General*, 300 Mich 207; 1 NW2d 530 (1942)."

Following the opinion of the Attorney General, the advisory board of the State Accident Fund attempted to have Senate Bill No. 38 of 1979 enacted, which would allow the State Accident Fund to merge with a domestic mutual insurer. In 1981, the State Accident Fund advisory board attempted to have Senate Bill No. 352 enacted, which would have provided:

> "The Accident Fund is a body corporate, separate and distinct from the state, and may sue and be sued, plead and be inpleaded, contract and be contracted with, and have a corporate seal."

If enacted, this act would have provided: "The business and affairs of the Accident Fund shall be managed by its governing board." Both attempts to amend the State Accident Fund act failed.

On May 1, 1981, a Complaint for Injunctive and Declaratory Relief was filed in the United States District Court for the Western District of Michigan. The Plaintiffs were the Acci-

dent Fund, claiming to be a legal entity, two employees of the Accident Fund, and two policyholder members of the advisory board of the Accident Fund. The Defendants were all officers of the State of Michigan: the Commissioner of Insurance, the Personnel Director of the Civil Service Commission, and the Director of the Department of Licensing & Regulation, which department included the Insurance Bureau.

Plaintiffs' Complaint alleged that the Defendants' actions impaired contracts in violation of U.S. Const., Art. 1, § 10, violated the due process and just compensation clauses of the fifth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment, violated 42 U.S.C. § 1983, and impaired the employees' rights under the Employee Retirement Income Security Act of 1974 ("ERISA").

The relief requested, other than relief requested under ERISA, in the complaint, is:

> "A. Issuance of a . . . injunctive order enjoining . . . the Defendants . . . from treating the Plaintiff Accident Fund as a state agency, subjecting the Plaintiff Accident Fund to the constitutional and statutory restrictions imposed on state agencies, classifying the employees of the Plaintiff Accident Fund as employees of the State of Michigan within the classified civil service of the State of Michigan, taking any and all other action which interferes with or which would interfere with the autonomous, independent and successful operation of Plaintiff Accident Fund, converting the assets of Plaintiff Accident Fund, and any other manner unlawfully interfering in Plaintiff Accident Fund's operations and unlawfully interfering with the rights and benefits enjoyed by Plaintiffs Ellison and Grost as employees of the Accident Fund and Plaintiffs Elston-Richards and Jameson as employers insured by the Accident Fund, . . ."

The Defendants' affirmative defenses included:

"1. *Lack of Jurisdiction over Subject Matter.* In addition to lacking subject matter jurisdiction, Defendants affirmatively state that the plan which is in effect is exempt from the provisions of the Employees Retirement Income Security Act (ERISA). Further, the ERISA allegations are simply a defense to anticipated state action and are cognizable in state court.

"2. *Abstention/Federal Equitable Restraint.* This case raises state constitutional issues which concern the organization of the executive branch of state government and the applicability of the state constitution's civil service provisions to certain employees of the Insurance Commissioner.

"3. *Lack of Any Actual Controversy under State or Federal Law Regarding Pension Plan.* The state officials have only come to tentative conclusions as to how the pension plans would be handled. No state officer has taken a final position as to this issue.

• • •

"6. *No deprivation has Occurred or is Imminently Threatened.* Const 1963, art 9, § 24 provides:

" 'The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.'

"If the pension plan is authorized by law and not in violation of state constitution or statute, the state officers fully intend to abide by the foregoing provision."

On March 18, 1982, Defendants filed a Motion for Summary Judgment contending that there was no genuine issue as to any material fact and that the sole legal question presented was whether the Accident Fund is an agency or instrumentality of the State of Michigan.

On August 19, 1982, the federal district court issued its Opinion granting Defendants' Motion for Summary Judgment in part and denying it in part. The federal district court Opinion held that the Accident Fund was a state agency since its creation and its employees were therefore state employees. The court also concluded that the state did not create the second pension plan in question and therefore the state has no obligation to contribute to its maintenance as the Plaintiffs must look to the employers-insureds for such contributions. The summary judgment was subsequently set aside on Plaintiffs' Motion for Rehearing alleging that a factual hearing was necessary in order to determine whether the legislature actually intended the creation of a state agency or instrumentality. The trial was scheduled for January 9, 1984.

On January 9, 1984, the federal district court issued its oral opinion on abstention on its own motion. The Defendants argued against abstention for the reason that nearly three years had elapsed since the filing of the original complaint and more than seven years since the Attorney General's opinion. Whether the Accident Fund was a state agency had to be decided.

Defendants, in their conclusion to the brief opposing abstention, stated:

> "However, if this court presumes that the Sixth Circuit Court of appeals will eventually remand and dismiss for failure of this court to abstain, then it is better that abstention occur now so that the parties may proceed to the state forum without further delay."

On January 9, 1984, Judge Enslen, prior to issuing his decision to abstain, entered a Consent Judgment. Despite the language of the Consent Judgment, Defendants argued unsuccessfully that the court did not have jurisdiction and that the Plaintiffs were not the prevailing party. On January 24, 1984, the court denied Plaintiffs' motion for injunction pending appeal. On February 2, 1984, the court issued its written opinion on abstention.

On June 22, 1984, the Michigan Civil Service Commission classified the employees assigned to the State Accident Fund into the State Civil Service. The advisory board of the State Accident Fund, Plaintiffs Ward Ellison and Max Grost filed a Petition for Review of the Michigan Civil Service Commission's action of June 22, 1984 with the Ingham County Circuit Court on August 19, 1984. The Petition included within its charges that the implementation plan constituted an unlawful and unconstitutional impairment of the rights of contract existing between the State Accident Fund and its employees. Specifically, the Petition charged that the proposed implementation plan provides that employer funding of a separate pension plan for State Accident Fund employees is to be discontinued and constituted an impairment of contract. The Petition further claimed that the separate pension plan established and maintained for State Accident Fund employees was protected by the provisions of ERISA. 29 U.S.C. & 1001 *et. seq.*

On July 20, 1984, the Defendants in this suit filed a Complaint in the Ingham County Circuit Court against the advisory board of the Michigan State Accident Fund and its individual members, the purported manager of the State Accident Fund, and the purported attorney and agent for the advisory board. The State's Motion for Summary Judgment was granted in part and denied in part by the Opinion of the Ingham County Circuit Court, dated May 14, 1985, as set

forth in its entirety in the attached Appendix. Both the June 22, 1984 action brought by the advisory board of the State Accident Fund and the State's action of July 20, 1984 are before Ingham County Circuit Court Judge Carolyn Stell.

Ingham County Circuit Court Judge Carolyn Stell's Opinion held that she could not grant a summary judgment as to the question whether the Accident Fund was a state agency without a trial to determine legislative intent.

On June 26, 1985, the Sixth Circuit Court of Appeals issued its Opinion affirming the District Court judgment to abstain with instructions for the District Court to retain jurisdiction over the Petitioners' ERISA claims. The Court had noted in footnote 1 (3a):

> "The claims of plaintiffs Elston-Richards Storage Company and Russell Jameson, employers who have memberships on the Advisory Board to the Fund and workmen's compensation policies insured by the Fund, were resolved by stipulation and a consent judgment entered by the district court on January 9, 1984. Thus, Elston-Richards Storage Company and Russell Jameson are not parties to this appeal."

The District Court had previously noted, in its Opinion of January 24, 1984, in footnote 2 (42a):

> "The Complaint was brought by the Accident Fund, named employees, and named member-insureds. By Consent Judgment filed January 9, 1984, the due process and just compensation claims of the Fund, Elston-Richards Storage Company, and Russell Jameson, only, have been resolved. All other constitutional claims remain."

REASONS FOR DENYING THE WRIT

I

THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DIRECTED THE DISTRICT COURT TO ONLY RETAIN JURISDICTION OF CLAIMS OF THE REMAINING PETITIONERS

This case involves an action brought against the three officers of the State of Michigan required by law to administer the statute which created the Accident Fund and the provisions of the Michigan Constitution which require the Civil Service Commission to classify all positions within the State service. The decision in this case would have a direct effect upon the State of Michigan by affecting the operation of the executive branch of government of the State and curtail the ability of the State to provide workers compensation insurance through the Accident Fund.

A reading of Petitioners' complaint leads to the ineluctable conclusion that all of Petitioners' claimed rights and therefore violations thereof arose out of the State statute which created the Accident Fund. The only remaining Petitioners in this appeal are the two employees of the Accident Fund, whose argument is that the State officer Respondents are violating State law in their attempts to assert that the Accident Fund is an agency of the State of Michigan or instrumentality of the state, and that the employees of the Accident Fund are employees of the State of Michigan. These remaining Petitioners seek relief as purported employees of a statutorily created "private independent entity" from the federal courts, despite the fact that the "private independent entity" has never filed any federal tax returns nor has it ever filed any forms required under ERISA.

The Sixth Circuit Court of Appeals affirmed the District Court judgment to abstain with instructions for the District Court to retain jurisdiction over the plaintiffs' ERISA claims. (7a) In doing so, the Sixth Circuit Court of Appeals concluded that the District Court should retain jurisdiction over only those matters which still remained undecided in the District Court. As noted in the Statement of the Case, both courts set forth in footnotes to their Opinions that claims of other parties were resolved by stipulation and a consent judgment. (3a and 42a)

The Petitioners had not alleged that the State statute which created the Accident Fund was unconstitutional. The allegation was merely that the State officer Respondents were attempting to enforce and interpret the State statute in a manner that violated ERISA. Moreover, Petitioners allege that their interpretation of the statute is correct because they have been enforcing the statute in the absence of enforcement by the State officer (Insurance Commissioner) named in the statute. Both the District Court and the Court of Appeals recognized that all of Petitioners' claims arose out of state law. Even the supplemental pension plan, which was established for the employees of the Accident Fund, arose out of the claim that the Advisory Board's power to fix compensation of employees included the power to establish a second pension fund for these employees in addition to the pension they receive as members of the State Employees Retirement System. Thus, the threshold question and the sole question with respect to all of Petitioners' claims is whether the Accident Fund is a State agency or instrumentality of the State, thus subjecting its employees to the civil service provisions of the state constitution.

Since, historically, the constitutional organization of the executive branch of State government, and the interpretation of State constitutions are not questions properly cognizable

by federal courts, the Sixth Circuit Court of Appeals determined it was proper to abstain from consideration of these questions. *Taylor and Marshall* v. *Beckman*, 178 U.S. 548; 20 S.Ct. 890; 44 L.Ed. 1187 (1899); *Sailors* v. *Board of Education of the County of Kent*, 387 U.S. 105; 87 S.Ct. 1549; 18 L.Ed.2d 650 (1967).

The Sixth Circuit Court of Appeals did not affirm or deny the District Court's exercise of its discretionary power to abstain on both *Pullman* and *Burford* grounds. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed. 971 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315; 63 S.Ct. 1098; 87 L.Ed. 1424 (1943). It should not be inferred that the Sixth Circuit Court of Appeals did not find *Burford* to be a valid basis for abstention. Rather, it should be inferred that the court did not find it necessary to abstain on both grounds because it was directing the District Court to retain jurisdiction as to the only claims in which the remaining Petitioners were involved. Those claims were solely as to ERISA. It was because the District Court abstained on both *Pullman* and *Burford* grounds that it dismissed the cause of action. The District Court noted in footnote 8 (51a) that the United States Supreme Court had recently issued its decision in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89; 104 S.Ct. 900; 79 L.Ed.2d 67 (1984). The District Court was encouraged that that decision ". . . may lend support, at least in spirit, to my decision to abstain, and in fact may raise questions as to this Court's jurisdiction to consider this case. . . ." The District Court further noted:

> ". . . Since the instant action involves, in effect, allegations that state officials have not complied with state law (as it has been construed for many years), my decision to abstain would appear to parallel the *Pennhurst* majority reasoning."

It was because the District Court considered an abstention under *Burford* appropriate and it was because of its recognition that what was involved in this suit were "allegations that state officials have not complied with state law", that this was a matter left entirely for the state courts. The Sixth Circuit Court of Appeals did not conclude that the Eleventh Amendment to the Constitution of the United States entirely denied jurisdiction to the District Court, but it did recognize that the District Court was not the forum where the necessary determination of whether the Accident Fund was a State agency should be resolved.

The Sixth Circuit Court of Appeals did not choose to dismiss the entire suit. It retained that portion that involved the remaining Petitioners. As it had noted earlier, the only Petitioners who remained were the two employees asserting the ERISA defense. No purpose would be served to retain jurisdiction of the other purported causes of action. While the Sixth Circuit Court of Appeals did not render an opinion as to the appropriateness of the abstention under *Burford*, it also did not overrule the District Court as to the District Court's decision to abstain under both *Burford* and *Pullman*. It is the position of the Respondents that the District Court was correct in abstaining under both *Pullman* and *Burford* for the reasons set forth in Argument II. The Sixth Circuit Court of Appeals did not state it affirmed in part and overruled in part. Its Opinion simply states that it affirms the District Court as to *Pullman*. It is fair to infer that the *Burford* abstention would have been affirmed as well if the Sixth Circuit Court of Appeals had considered dismissing the entire cause. Both the District Court and the Sixth Circuit Court of Appeals exercised discretionary powers in deciding to abstain. The Sixth Circuit Court of Appeals' silence should not be inferred to be disagreement, but only a recognition that this cause was so manifestly a matter which should be considered by the state courts that it found it unnecessary to discuss both doctrines.

II

ABSTENTION UNDER THE BURFORD DOCTRINE AS WELL AS THE PULLMAN DOCTRINE IS APPROPRIATE

A. Pullman Doctrine.

The federal district court, in its abstention opinion (44a-45a), notes:

> ". . . Although Plaintiffs have phrased much of their cause of action in federal constitutional terms, the threshhold question is whether the Accident Fund is a state agency or instrumentality; a question of state law interpretation. State law on this issue, *as Plaintiffs freely admit, is ambiguous*. Furthermore, since the propriety, and thus the constitutionality, of the directives issued by the Insurance Commissioner depends upon a determination as to the state agency or instrumentality status of the fund, the requisite federal constitutional claims which might be mooted or presented in a different posture by a state court determination of pertinent state law are present. . . ." (Emphasis added.)

Manifestly, the federal district court was correct in its observation. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed. 971 (1941), is clearly applicable to the case at hand. Petitioners assert, citing *WXYZ, Inc.* v. *Hand*, 658 F.2d. 420 (6th Cir. 1981), that because the Michigan Supreme Court refused to accept the certified questions from the federal district court and issue an opinion thereon, the *Pullman* abstention cannot apply. True, in *WXYZ, supra*, the Sixth Circuit Court of Appeals did state that one of the reasons it would not grant *Pullman* abstention was the failure of the Michigan Supreme Court to respond to the certified

questions. However, the questions that were certified to the Michigan Supreme Court in this case required an enormous appendix, 826 pages in length, and as the district court noted, Petitioners admitted there was ambiguity as to the laws. Moreover, the action of the district court in dissolving the summary judgment awarded to Respondents, and deciding to hold a trial at Petitioners' request indicates the complexity of the facts that were to be considered. Thus, the opportunity given to the Michigan Supreme Court was to consider a legal question that was far too complex to consider without a factual development. That factual development is now being pursued in the Ingham County Circuit Court, as set forth in the Opinion of the Honorable Carolyn Stell appearing in the Appendix of Respondents.

On the other hand, the question presented to the Michigan Supreme Court in *WXYZ, supra*, was a very simple statutory construction without need of any factual background. Moreover, the Sixth Circuit Court of Appeals correctly noted that the statute was an embarrassment to those charged with its enforcement:

> "The record suggests that the potentially interested parties in Michigan, other than Judge Hand, are either not interested in saving the statute or do not think a constitutional construction is possible. The District Court invited Michigan's Attorney General and an Oakland County prosecutor to the hearing on plaintiffs' motion for a preliminary injunction and encouraged them to participate in the hearing. The Attorney General's Office failed to send a representative to the hearing. The Chief Appellate Counsel for the prosecutor's office appeared and stated: 'In a nutshell, we believe the statute is unconstitutional and that the suppression order should not have been

> ordered.' The prosecutor's office did not participate further in the proceedings."
>
> 658 F.2d. 420, at 424, n. 6.

The second reason given in *WXYZ, supra,* is really the basis for the court's decision, and that is:

> "Second, we simply do not believe that this is a proper case for abstention. . . ."
>
> 658 F.2d. 420, at 425.

Abstention was inappropriate because the statute was unconstitutional on its face, having failed to provide for a judicial inquiry into the need for a suppression order. There were no ambiguities in the statute involved in *WXYZ*. The Sixth Circuit Court of Appeals stated:

> "The terms of M.C.L.A. § 750.520k are unambiguous; they leave no room for a construction which would require judicial inquiry into the need for a suppression order in a given case. As a result, abstention is inappropriate notwithstanding the absence of an authoritative interpretation of the statute by the Michigan Supreme Court."
>
> 658 F.2d. 420, at 425.

The same cannot be said for the case before this Court. This is a case which clearly requires the interpretation of ambiguous state laws and the state constitution. Here, an authoritative interpretation of the statutes and the Michigan Constitution would be important in the consideration of any possible federal constitutional rights. In *WXYZ, supra,* there could be no conceivable interpretation which would justify a finding of constitutionality of the state statute.

In this case, the Sixth Court of Appeals found to be without merit the Petitioners' contention that the Michigan Supreme Court's failure to resolve the certified questions required the district court to exercise jurisdiction. The Sixth Circuit Court of Appeals concluded in their Opinion (7a):

> ". . . The Michigan Supreme Court's refusal to consider the questions submitted by the district court is not determinative of the decision to abstain in this case. At the time of certification, several unresolved factual disputes over how the Fund operated, precluded issuance of a cogent ruling on the Fund's status. As those disputes are currently under consideration in the Ingham County Circuit Court, on appeal the Michigan Supreme Court will have the benefit of a clear factual record with which to resolve the dispute over the Fund's statute. . . ."

The Michigan Supreme Court should not be expected to issue what is tantamount to a summary judgment concerning the law when 826 contradictory pages of appendix accompany the certified questions. Therefore, assuming that the federal district court possessed the jurisdiction to consider the claims set forth in the complaint, abstention under the *Pullman* doctrine was warranted and prudent.

B. Burford Abstention.

The District Court's Opinion with regard to abstention under the *Burford* doctrine is concise and accurate. The District Court (at 48a-49a) correctly observes:

> ". . . The potential ramifications of a ruling on those issues are great. Indeed, it is conceivable that the overall nature of the worker's compensation insurance industry in the State of Michigan could be altered. . . ."

This case easily meets the test of *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25; 79 S.Ct. 1070; 3 L.Ed.2d 1058 (1958), because it involves difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of this case. The entire future of the operation of the State Accident Fund and the workers compensation system in Michigan is at stake. The decision of the issues in this case will constitute the basis for all future cases dealing with the control and operation of the State Accident Fund and its impact on the provision of workers compensation insurance within the State of Michigan. It is one of the three remaining legs of the original four-legged stool upon which all workers compensation insurance must rest. If this leg is weakened, the state's entire policy on providing workers compensation would tumble.

As required, the state law in this case is not settled and questions bearing on state policy are presented for decision. The exercise of federal jurisdiction here would interrupt the state's effort to effect its policy respecting the provision of workers compensation within the State of Michigan. Thus, all of the tests for *Burford* set forth in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800; 96 S.Ct. 1236; 47 L.Ed.2d 483 (1976), have been fulfilled.

Additionally in this case, all of the parties are located in Ingham County. The State Accident Fund is located in Lansing at the seat of government of the state. The employees and state officers work in Lansing and the two advisory board members hold their meeting with regard to the State Accident Fund in Lansing. Lansing is not only the site of all the parties, it is also the site where all the alleged wrongdoing occurred. The statutes concerning jurisdiction and venue would all require the action to be brought in Ingham County.

The Ingham County Circuit Court is also important for another reason, for as the District Court stated ". . . This Court has been petitioned numerous times, during the course of these proceedings, to intercede in a variety of disputes between the Commissioner and the Fund. . . ." (49a) All the disputes arise and all the disputants and their attorneys reside in Ingham County. It is inconvenient for all parties to carry disputes to Kalamazoo and it is equally inconvenient to supervise a State fund located in Lansing from Kalamazoo.

Logically, then, the *Burford* doctrine and sound judicial administration would have permitted the Sixth Circuit Court of Appeals to abstain on both *Pullman* and *Burford* grounds. This would have permitted the Court to affirm the District Court judgment and the dismissal of the entire cause. In its discretion, the Sixth Circuit Court of Appeals chose to abstain only on *Pullman* grounds and to retain jurisdiction as to ERISA claims of the remaining Petitioners. This exercise of discretion cannot be termed to be arbitrary and capricious. Moreover, it cannot be deemed to be a violation of the *Pullman* doctrine cases because the Court did not dismiss the cause; it retained jurisdiction of the unresolved claims of the Petitioners.

RELIEF REQUESTED

Respondents respectfully request that the writ be denied.

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Dated: November 14, 1985

No. 85-626

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, § 1, 1915 CL 5477, et al

Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, et al

Respondents.

APPENDIX
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
BRIEF IN OPPOSITION

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Ingham County Circuit Court Opinion, Honorable Carolyn Stell, in the case of *Nancy A. Baerwaldt, et al* v. *Advisory Board of the Michigan State Accident Fund, et al*, File No. 84-52547-AZ, dated May 14, 1985 ..... 1a

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

HONORABLE CAROLYN STELL

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan; JOHN HUENI, JR., Personnel Director of the Civil Service Commission, On Behalf of the Civil Service Commission; ELIZABETH P. HOWE, Director of the Department of Licensing and Regulation, v Plaintiffs, ADVISORY BOARD OF THE MICHIGAN STATE ACCIDENT FUND; JOLLIE N. ALLEN, RAYMOND C. ALSTROM, WILLIAM K. CARPENTER, DAVID J. FARROW, DONALD A. FRAZA, RUSSELL JAMESON, ROBERT E. KLINTWORTH, JR., HOWARD J. McALEER, HENRY A. MOLLICONE, E. ALLAN MORROW, GERALD J. OSTERMAN, MILFORD E. WOODBECK and PHILIP G. WILLIAMS, Each individually and as members of the Michigan State Accident Fund Advisory Board; FLOYD W. LUGINBILL, Purported Manager of the Michigan State Accident Fund, and FRANK J. NERAT, JR., Purported Attorney and Agent for the Advisory Board and Michigan State Accident Fund, Defendants.	File No. 84-52547-AZ

OPINION AND ORDER OF THE COURT

This case was commenced by the July 20, 1984 filing of the complaint of plaintiff Commissioner of Insurance (Commissioner) and other state officials for injunctive, declaratory and other relief. It is currently before the Court on plaintiffs' motion for summary judgment under GCR 1963, 117.2(2) and (3) filed August 24, 1984. Defendants Advisory Board of the Michigan State Accident Fund, individual members of the Advisory Board, manager and attorney answered the motion and filed a brief in opposition on September 21, 1984. Plaintiffs replied to defendants' brief on September 28, 1984, and defendants filed a supplemental brief November 26, 1984. Oral argument was waived, as confirmed by defendants' letter of December 7, 1984.

By consent order of July 24, 1984, the operation of the Michigan State Accident Fund (Fund), which may be subjected to substantial modification as a result of this litigation, was effectively continued in status quo by this Court in the exercise of her equitable jurisdiction. Because this decision, while it disposes of the legal issues presented by this motion, does not resolve all of the issues in the case and does not solve the problems which necessitated the consent order, that order is not modified by this opinion and order and remains in full force and effect until further order of this Court.

Plaintiffs' motion for summary judgment under Rules 117.2(2) and (3) requests judgment by this Court as a matter of law that:

I. The Commissioner has supervisory and administrative control of the Fund.

II. For purposes of Const 1963, art 11, §5, the Fund is a state agency and is subject to the jurisdiction of the Civil Service Commission.

Numerous subsidiary declarations of law as to each of these propositions were included in the motion. For the reasons explained below, the Court will grant the motion as to the Commissioner's control of the Fund to the extent specified below, but will deny the motion as to the state agency question.

Supervisory and Administrative Control

Rule 117.2(2)

The standard of review for a motion brought pursuant to Rule 117.2(2) is set forth in *Bob* v *Holmes*, 78 Mich App 205, 210-211; 259 NW2d 427 (1977):

> "A motion for summary judgment granted on the failure to state a valid defense tests the legal sufficiency of the pleaded defense. Such motion is tested by reference to the pleadings alone. *Durant v Stahlin*, 375 Mich 628, 644; 135 NW2d 392 (1965), *Todd v Biglow*, 51 Mich App 346, 349; 214 NW2d 733 (1974), *lev den*, 391 Mich 816 (1974). All well-pleaded allegations must be accepted as true. *Minor-Dietiker v Mary Jane Stores of Michigan, Inc*, 2 Mich App 585, 588; 141 NW2d 342 (1966). Drawing from the standard used for failure to state a claim, we believe the proper test for such a motion would be whether defendants' defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiffs' right to recovery. *Crowther v Ross Chemical & Mfg Co*, 42 Mich App 426, 431, 202 NW2d 577 (1972)."

The statutory provisions governing creation and operation of the Fund are now found at MCL 418.701-755; MSA 17.237 (701)-(755). The rules of statutory construction are set forth in *In re: Certified Questions, Karl* v *Bryant Air Conditioning Co*, 416 Mich 558, 567 (1982):

> "The most important rule, of course, is to discover and give effect to the legislative intent. [Citations omitted]
>
> "The next rule is to derive the legislative intention from the actual language used in the statute. [Citation omitted] If the language used is clear and the meaning of the words chosen is unambiguous, a commonsense reading of the provision will suffice, and no interpretation is necessary. [Citations omitted]."

This Court's task is to give effect to the plain meaning of the language chosen by the Legislature. *Owendale-Gagetown School District* v *State Board of Education*, 413 Mich 1 (1982).

The Court has read the statute, and the provisions thereof clearly and unambiguously vest the Commissioner with supervisory and administrative control of the Fund to the following extent:

1. The Commissioner is the administrator of the Fund, MCL 418.701; MSA 17.237(701):

> "*An accident fund is created* to provide workmen's compensation insurance for employers *under the supervision of the commissioner* * * *" (Emphasis added)

MCL 418.735; MSA 17.237(735):

> "The books, records and payrolls of each employer insured by the accident fund shall always be open to inspection by the *commissioner* or his duly authorized agent or representative for the purpose of ascertaining the correctness of the amount of the payroll reported, the number of men employed and such other information as the *commissioner* may require in the *administration* of the accident fund. * * *" (Emphasis added)

MCL 418.741; MSA 17.237(741):

> "The *commissioner* shall keep complete records of all business transacted by him in the *administration* of the accident fund. He may employ such deputies and assistants and clerical help as may be necessary and as the advisory board may authorize, for the proper *administration* of the accident fund *and the performance of the duties imposed upon him* by the provisions of this act, at such compensation as may be fixed by the advisory board and may also remove them. The *commissioner* and the deputies and assistants shall be entitled to receive their actual and necessary expenses while traveling upon the business of the accident fund. All salaries and expenses shall be charged to and paid out of the accident fund. The *commissioner* shall include in his annual report a full and correct statement of the *administration* of the accident fund, showing its financial status and outstanding obligations, the claims contested and why and general statistics in respect to it." (Emphasis added)

2. The Commissioner may employ deputies, assistants and clerical help as may be necessary and as the Fund Advisory Board may authorize. Employment shall be at such compensation as may be fixed by the advisory board. §741, *supra*. The Commissioner may remove all such employees. §741, *supra*.

3. The Commissioner and the State Treasurer may invest and retain the monies of the Fund in excess of a sufficient amount of cash to pay current losses and expenses in securities as are specified by law for investment by casualty insurance companies and in accordance with rules and conditions as set forth by them. MCL 418.705; MSA 17.237(705):

> "There shall be maintained in the accident fund a sufficient amount of cash to pay current losses and expenses

> and the balance may be *invested by the commissioner and the state treasurer* acting together, in such securities as are specified by law for investment by casualty insurance companies. All securities shall be purchased and may be sold at such time, in such manner and *in accordance with such rules and conditions* as may be prescribed by the joint action of *the commissioner and the state treasurer*. ° ° °" (Emphasis added)

See also MCL 21.101a; MSA 3.606(1a).

4. The Commissioner may readjust premiums and assessments as necessary to make the Fund self-supporting. MCL 418.711; MSA 17.237(711):

> "The accident fund shall be neither more nor less than self-supporting and the premiums or assessments levied for such purpose shall be subject to readjustment by the *commissioner* as may become necessary." (Emphasis added)

5. The Commissioner may establish the rating classification system for the employer members, the amount of premiums or assessments payable by the employer members, may change that amount as conditions of the employers' places of business with regard to safety may justify, and may prescribe when and in what manner the premiums and assessments shall be paid. MCL 418.715; MSA 17.237(715):

> "The *commissioner* may classify the establishments or works of such employers in groups in accordance with the nature of the business in which they are engaged and the probable risk of injury to their employees under existing conditions. He shall determine the amount of the premiums or assessments which employers shall pay the accident fund, may prescribe when and in what manner the pre-

> miums and assessments shall be paid, may change the amount thereof in respect to any or all of such employers as circumstances may require and the condition of the respective plants, establishments or places of work in respect to the safety of their employees may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable and just as among such employers." (Emphasis added)

6. The Commissioner has the duty and responsibility for promulgating rules concerning insurance, compliance with which will require that an applying employer be provided insurance by the Fund. MCL 718.725; MSA 17.237(725):

> "Every employer requesting insurance in the accident fund, upon complying with the *rules* concerning the insurance *adopted by the commissioner*, shall be furnished with a certificate showing the date on which the insurance becomes effective. * * *" (Emphasis added)

7. The Commissioner has authority to inspect the books, records and payroll of each insured employer for the purpose of ascertaining the correctness of the amount of the payroll reported, persons employed and other purposes as the Commissioner may require in the administration of the Fund. Employers must submit statements of their payroll to the Commissioner. MCL 418.735; MSA 17.237(735):

> "The books, records and payrolls of each employer insured by the accident fund shall always be *open to inspection by the commissioner* or his duly authorized agent or representative for the purpose of ascertaining the correctness of the amount of the payroll reported, the number of men employed and such other information as the commissioner may require in the administration of the accident fund. Refusal on the part of any employer to submit

> books, records and payrolls for inspection shall subject the offending employer to a penalty of $50.00 for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who personally gives the refusal is guilty of a misdemeanor. Any employer who knowingly submits to the commissioner a false statement of payroll for the purpose of securing a lower premium charge is guilty of a misdemeanor and shall be fined not less than $100.00 or imprisoned for not more than 30 days in the county jail, or both." (Emphasis added)

8. The Commissioner must keep complete records of all business transacted by the Commissioner in the administration of the Fund. §741, *supra.*

9. The Commissioner shall include in the Commissioner's annual report (see MCL 500.238; MSA 24.1238) a full and correct statement of the administration of the Fund, showing its financial status and outstanding obligations, the claims contested and why, and general statistics in respect to the Fund. §741, *supra.*

10. The Commissioner may determine that it is necessary to dissolve the Fund. MCL 418.751; MSA 17.237(751):

> "If this chapter is repealed, or if in the *judgment of the commissioner* it becomes necessary *to dissolve* the accident fund, all moneys which are in the accident fund at such time shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard to the obligation incurred and existing to pay compensation under the provisions of this act." (Emphasis added)

11. The Commissioner shall call the annual meeting of the employer insureds. MCL 418.755; MSA 17.237(755) provides:

> "An annual *meeting* of the employer-members of the accident fund shall be *called by the commissioner* in Lansing in October, which may be attended by the members in person or by a representative. * * *" (Emphasis added)

In light of the unambiguous statutory language specifying the eleven duties relating to the supervisory and administrative responsibility of the Commissioner, defendants' defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiffs' requested declaratory ruling on this issue. Summary judgment under GCR 1963, 117.2(2) should be granted.

Rule 117.2(3)

Having decided the motion on the above analysis, it follows that no facts may be discovered to change the law as it was passed by the Legislature. Therefore, further discovery could not uncover factual support for the litigant's position and summary judgment under GCR 1963, 117.2(3) should be granted even though discovery is not complete. *Crider* v *Borg*, 109 Mich App 771, 772-773; 312 NW2d 156 (1981).

State Agency

Rule 117.2(3)

The standard for reviewing a motion brought pursuant to this subrule is set forth in *Huff* v *Ford Motor Co*, 127 Mich App 287, 293; 338 NW2d 387 (1983):

> "A motion for summary judgment premised upon the ground that there is no genuine issue as to any material fact, GCR 1963, 117.2(3), requires the trial court to review the entire record to determine whether the non-moving party has discovered facts to support the claim or defense. The trial court is obligated to look beyond the pleadings and consider affidavits, depositions, and interrogatories. Based upon the entire record, the trial court must give the benefit of any reasonable doubt to the opposing party in determining whether there is a genuine issue as to a material fact. *Rizzo v Kretschmer*, 389 Mich 363, 371-372; 207 NW2d 316 (1973). Before judgment may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. *Partrich v Muscat*, 84 Mich App 724; 270 NW2d 506 (1978); *Fry v Ionia Sentinel-Standard*, 101 Mich App 725; 300 NW2d 687 (1980)."

Unlike the previous issue concerning the Commissioner's supervisory and administrative control of the Fund, the resolution of the "state agency" issue is not readily decided by reference to the statute, with application of the usual rules of statutory construction. For example, while the determination of "state agency" status for purposes of Const 1963, art 11, §5 was not before the Court in *Hanselman* v *Wayne County Concealed Weapon Licensing Board*, 419 Mich 168, 184 (1984), an analogous question of whether the Licensing Board was a state board for purposes of the Administrative Procedures Act was decided. The Court adopted the following analysis from *Advisory Opinion Re Constitutionality of PA 1966, No 346*, 380 Mich 554, 571 (1968):

> " 'We must * * * look behind the name to the thing named. We must examine its character, its relations, and its functions to determine, indeed, whether it is an agency or instrumentality of state government.' "

Plaintiffs claim that the Fund's character, relations and functions are determinable from the statute and require a finding that it is a state agency for purposes of Const 1963, art 11, §5. In contradistinction to the statutes regarding the Commissioner's supervisory and administrative duties, the Court finds no conclusive statutory provisions that mandate a finding that the Fund is a state agency for the constitutional purpose proffered. When the statutory language is not clear and unambiguous, the Court must look to other means of establishing legislative intent. Such indicia of legislative intent may include the administrative and executive construction of the relevant statutes, along with legislative acquiescence (through inaction). An evidentiary hearing is required. *Cf.* issues addressed by testimony in *State Bar of Michigan* v *City of Lansing*, 361 Mich 185, 188-190 (1960).

This Court, in looking at the character of the Fund, its relations and its functions can not say that evidence may not be presented at trial which would support defendants' position that the Fund is not a state agency for Const 1963, art 11, §5. The fact that discovery is still pending which may bring to light new evidence on this disputed issue makes a grant of summary judgment under Rule 117.2(3) premature at this time. *Kortas* v *Thunderbowl Lounge*, 120 Mich App 84, 87; 327 NW2d 401 (1982); *Goldman* v *Loubella Extendables*, 91 Mich App 212; 238 NW2d 695 (1979).

Nor does the supervisory and administrative authority over the Fund which this Court has declared as abiding in the Commissioner require a finding that the Fund is a state agency. Even cases cited by Plaintiffs support the concept that an entity may be a state agency for some purpose, e.g. exemption from taxation, without being subject to Const 1963, art 11, §5. See *State Bar of Michigan* v *City of Lansing*, *supra*, 194, 197-198. (The Court takes judicial notice that employees of the State Bar are not Civil Service employees.)

Summary judgment will be denied without prejudice.

Rule 117.2(2)

Defendants have denied that they are a state agency for purposes of Const 1963, art 11, §5. Since the Court has found that the issue can not be determined by applying the rules of statutory construction, such a denial is sufficient to defeat a motion brought under Rule 117.2(2). *Hanon* v *Barber*, 99 Mich App 851; 298 NW2d 866 (1980). Summary judgment will be denied.

ORDER

For the reasons set forth in this Opinion, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment under GCR 1963, 117.2(2) and (3) for declaratory judgment that the Commissioner has supervisory and administrative control of the Fund is GRANTED in part as follows:

The Commissioner has supervisory and administrative control of the Fund to the following extent:

a. The Commissioner is the administrator of the Fund.

b. The Commissioner may employ deputies, assistants and clerical help as may be necessary and as the Fund Advisory Board may authorize. Employment may be at such compensation as may be fixed by the Advisory Board. The Commissioner may remove all such employees.

c. The Commissioner and the State Treasurer may invest and retain the monies of the Fund in excess of a sufficient amount of cash to pay current losses and expenses in securities

as are specified by law for investment by casualty insurance companies and in accordance with rules and conditions as set forth by them.

d. The Commissioner may readjust premiums and assessments as necessary to make the Fund self-supporting.

e. The Commissioner may establish the rating classification system for the employer members, the amount of premiums or assessments payable by the employer members, may change that amount as conditions of the employers' places of business may justify, and may prescribe when and in what manner premiums and assessments shall be paid.

f. The Commissioner has the duty and responsibility for promulgating rules concerning insurance, compliance with which will require that an applying employer be provided insurance by the Fund.

g. The Commissioner has the authority to inspect the books, records and payroll of each insured employer. Employers are to submit statements of their payroll to the Commissioner for the purpose of ascertaining the correctness of the amount of payroll, persons employed, and other purposes as the Commissioner may require in the administration of the Fund.

h. The Commissioner must keep complete records of all business transacted by the Commissioner in the administration of the Fund.

i. The Commissioner shall include in the Commissioner's annual report a full and correct statement of the administration of the Fund, showing its financial status and outstanding obligations, the claims contested and why, and general statistics with respect to the Fund.

j. The Commissioner may determine that it is necessary to dissolve the Fund.

k. The Commissioner shall call the annual meeting of the employer insureds.

The remainder of plaintiffs' motion on this issue is DENIED.

2. Plaintiffs motion for summary judgment under GCR 1963, 117.2(2) and (3) that the Fund is a state agency for purposes of Const 1963, art 11, §5 and is subject to the jurisdiction of the Civil Service Commission is DENIED. The denial under Rule 117.2(3) is without prejudice.

3. The consent order of July 24, 1984 shall remain in full force and effect until further order of this Court.

Dated: May 14, 1985

Carolyn Stell /s/
CAROLYN STELL, Circuit Judge